DATUK SERI PANGLIMA MOHD SARI DATUK HJ NUAR

v.

VEE SENG DEVELOPMENT SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-1151-05]
10 MAY 2009

EVIDENCE: *Fresh or further evidence - Admission of fresh evidence on appeal - Whether admissible - Ladd v. Marshall - Courts of Judicature Act 1964, s. 69 - Rules of the Court of Appeal 1994, r. 7*

The respondents as plaintiffs obtained judgment against the appellant as defendant for a refund of RM7.35 million ('the moneys') that had been collectively given to the appellant to facilitate the purchase of shares in particular companies. The appellant applied for stay of the judgment pending appeal but that was dismissed by the High Court. The appellant then applied for stay before this court. The respondents opposed the application and in the exchange of affidavits that followed disclosed documents that were suppressed during the trial of the action. The said documents had the effect of absolving the appellant's liability to refund the payment in question, consistent with the appellant's claim of an oral agreement made between the parties that had the effect of overriding the appellant's undertaking to refund the payment in question. The appellant now sought to adduce the aforesaid as fresh evidence under s. 69 of the Courts of Judicature Act 1964 read together with r. 7 of the Rules of the Court of Appeal 1994 ('encl. 31a').

Held (allowing encl. 31a)
Per Abdul Malik Ishak JCA:

(1) The first and third respondents had deliberately misled and suppressed material evidence before the High Court and alleged that the appellant was liable for the payment of the shares when in realty, from the fresh evidence, it was clear that payment had been made by them from the very beginning. Consequently, the appellant's assertion that the first

A and the third respondents had agreed to pay for the allocation of shares themselves had been credible and consistent with the appellant's defence that was filed. (para 30)

(2) The appellant rightly submitted that the fresh evidence could B not have been obtained with reasonable diligence for use at the trial before the High Court. The appellant at all material times believed that the first and the third respondents had not paid for the shares and that they had brought this suit to recover the moneys with the view of paying for the same. C (para 31)

(3) The learned judge might have come to an entirely different conclusion if advised that the first and the third respondents had made the payment for the shares on the very same day when the demand was made to the appellant to make payment D for the same. Further, the facts showed that the first and third respondents had released the appellant from the relevant undertaking. The fresh evidence would probably have an important influence on the outcome of the claim. (paras 32, 33 & 34) E

(4) All those documents in encl. 31a, that sought to admit as fresh evidence the notice of motion for stay together with the relevant affidavits, had been filed in court and must be taken to be official court documents. Those documents, *prima facie*, F must be presumed believed and apparently credible although it need not be incontrovertible. All three conditions that were stipulated in the case of *Ladd v. Marshall* had been satisfied. Notwithstanding r. 7(3A) of the Rules of the Court of Appeal 1994, encl. 31a would still be allowed in favour of the G appellant. (paras 35, 36 & 38)

Per Wan Adnan Muhamad JCA (in Bahasa Malaysia as per His Lordship's Bahasa Malaysia judgment):

H **(1)** Lampiran 31a dibenarkan atas fakta latarbelakang kes ini. Fakta kes ini adalah berbeza dengan fakta kes-kes yang dibangkitkan oleh responden. Dalam kes-kes tersebut, permohonan adalah untuk kemukakan keterangan baru dalam rayuan ialah mengenai keterangan yang bukan merupakan yang wujud dalam I prosiding rayuan. Dalam kes *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd*, keterangan baru yang hendak dikemukakan ialah keterangan saksi yang akan diperolehi melalui proses prosedur pengambilan keterangan saksi dalam bicara. Dalam

permohonan Lampiran 31a keterangan baru ialah untuk mengemukakan afidavit-afidavit bersabit dengan prosiding pengantungan di mahkamah ini. Adalah tidak dinafikan keterangan tersebut tidak dikemukakan semasa perbicaraan di Mahkamah Tinggi. Ia hanya ditemui di dalam afidavit-afidavit dalam prosiding pengantungan yang dikatakan. (perenggan 60)

(2) Keterangan baru tersebut berkemungkinan dapat mempengaruhi keputusan hakim Mahkamah Tinggi kerana ia adalah bersangkut rapat dengan pembayaran harga saham-saham berkenaan yang dianggap boleh melupuskan tanggungjawab perayu untuk membayar RM7.35 juta. Adalah suatu prinsip mantap bahawa keterangan baru tersebut boleh diterima walaupun berkemungkinan boleh dipertikaikan. (perenggan 61)

(3) Keterangan baru yang dijumpai pada saat-saat akhir tidak mungkin dapat dijadikan kenyataan dalam pliding. (perenggan 62)

(4) Dengan keterangan baru, ia akan dapat membantu mahkamah mencapai keputusan yang saksama. Penerimaan keterangan baru yang merupakan afidavit-afidavit berkenaan tidak akan memprejudiskan pihak responden kerana afidavit-afidavit tersebut juga termasuk afidavit pihak responden sendiri. (perenggan 63)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden selaku plaintif telah memperoleh penghakiman terhadap perayu selaku defendan supaya perayu mengembalikan sejumlah RM7.350 juta ('wang tersebut') yang diberikan secara kolektif kepada perayu untuk membeli saham-saham beberapa syarikat tertentu. Perayu memohon perintah penggantungan penghakiman sementara menunggu rayuan, tetapi permohonannya ditolak oleh Mahkamah Tinggi. Perayu kemudian memohon ke Mahkamah semasa untuk perintah penggantungan. Responden-responden membantah tetapi semasa proses pertukaran afidavit-afidavit telah mendedahkan dokumen-dokumen yang tidak dikemukakan semasa perbicaraan tindakan dahulu. Dokumen-dokumen tersebut secara berkesannya telah melepaskan perayu dari apa-apa liabiliti untuk membayar balik wang tersebut, di mana ini adalah konsisten dengan dakwaan perayu bahawa wujud perjanjian lisan di antara pihak-pihak yang melupuskan akujanji perayu untuk membayar balik wang tersebut. Maka perayu kini memohon untuk mengemukakan dokumen-dokumen berkenaan sebagai keterangan

baru di bawah s. 69 Akta Mahkamah Kehakiman 1964 dibaca bersama k. 7 Kaedah-Kaedah Mahkamah Rayuan 1994 ('Lampiran 31a').

Diputuskan (membenarkan lampiran 31a)
Oleh Abdul Malik Ishak HMR:

(1) Responden-responden pertama dan ketiga telah tidak mendedahkan keterangan material dan dengan sengaja telah mengelirukan Mahkamah Tinggi. Mereka mendakwa bahawa perayu bertanggungan di atas pembayaran saham-saham sedangkan ianya jelas, berdasarkan keterangan baru, bahawa pembayaran telah pun dibuat oleh mereka sendiri sejak dari awal-awal lagi. Oleh itu, dakwaan perayu bahawa responden-responden pertama dan ketiga sendiri bersetuju untuk membuat pembayaran terhadap saham-saham yang diagihkan adalah boleh dipercayai dan konsisten dengan pembelaan beliau yang difailkan.

(2) Perayu telah dengan betulnya berhujah bahawa keterangan baru tidak dapat diperolehi melalui usaha munasabah untuk digunakan di hadapan Mahkamah Tinggi. Perayu pada semua waktu material mempercayai bahawa responden-responden pertama dan ketiga telah tidak membayar harga saham-saham dan bahawa mereka mengambil tindakan di sini bagi mendapatkan wang tersebut untuk membayar saham-saham berkenaan.

(3) Yang arif hakim mungkin akan mencapai satu keputusan yang berlainan jika mendapat nasihat bahawa responden-responden pertama dan ketiga telah pun membuat pembayaran bagi saham-saham pada hari yang sama apabila tuntutan baginya dibuat. Selain itu, fakta menunjukkan bahawa responden-responden pertama dan ketiga telah membebaskan perayu dari akujanjinya tersebut. Maka keterangan baru berkemungkinan mempunyai pengaruh penting terhadap keputusan guaman.

(4) Semua dokumen di lampiran 31a yang memohon supaya notis usul untuk penggantungan diterima sebagai keterangan baru, serta afidavit-afidavit yang relevan, telah difailkan di mahkamah dan hendaklah diterima sebagai dokumen rasmi mahkamah. Dokumen-dokumen tersebut, *prima facie*, hendaklah dianggap sebagai boleh dipercayai walaupun tidak semestinya tidak boleh

dipertelingkahkan langsung. Jelas, ketiga-tiga syarat seperti yang dibentangkan oleh *Ladd v. Marshall* telah dipenuhi. Oleh itu, walaupun terdapat k. 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994, lampiran 31a masih dibenarkan dengan berpihak kepada perayu.

Case(s) referred to:

Asiatic Development Berhad & Anor v. Balachandar Palanysamy [1996] 1 CLJ 725 CA ***(refd)***

Ing Merchant Bank (Singapore) Ltd & Anor v. Dato' Mohamed Anuar Embong [2001] 4 CLJ 73 CA ***(refd)***

Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors [1997] 2 CLJ 116 CA

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(refd)***

Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd and Other Appeals [2004] 4 CLJ 282 CA ***(refd)***

Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***

Sinanide v. La Maison Cosmeo [1927-1928] 44 TLR 574 ***(refd)***

Teoh Kien Peng & Anor v. Thannimalai Subramaniam [2009] 1 LNS 308 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69

Rules of the Court of Appeal 1994, r. 7(3), (3A)

Rules of the High Court 1980, O. 55 r. 5A

For the appellant/defendant - Dato' Mohd Shafee Abdullah; M/s Shafee & Co

For the respondents/plaintiffs - Mr Saranjit Singh; M/s Tuan, Mohd Zain & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak JCA:

[1] I find myself in complete agreement with the judgment of my learned brother Wan Adnan Muhamad JCA and I concur that the reception of fresh evidence advanced by the appellant defendant in encl. 31a be allowed. However, I wish to express my views about the reception of fresh evidence in the context of encl. 31a.

[2] The appellant defendant sought to admit three affidavits filed in this court as fresh evidence for the purpose of using these three affidavits in the appeal before this court. The brief background that prompted the appellant defendant to adduce the fresh evidence may be stated as follows.

[3] The trial proper was concluded on 26 July 2005 and judgment was entered on 19 September 2005. The fresh evidence sought to be adduced pertained to the appellant defendant's notice of motion for stay which culminated in the exchange of affidavits between the parties. The affidavit in reply of the respondents plaintiffs affirmed by Lim Chin Khuan on 28 December 2005 enclosed documents which were suppressed during the trial of this action in the High Court and were in direct contradiction to exhibit marked as "DSSN3".

[4] The first respondent plaintiff by the name of Vee Seng Development Sdn Bhd was wholly owned by the third respondent plaintiff by the name of Veetar Plantations Sdn Bhd. While the second respondent plaintiff was an independent company. The respondents plaintiffs' claim against the appellant defendant was for a refund of RM7,350,000 ("the moneys") collectively given to the appellant defendant to facilitate the purchase of shares in six companies which were to be allocated certain lands. The appellant defendant undertook to refund the moneys in the event these lands were not so allocated (hereinafter referred to as "the first undertaking").

[5] It turned out that the said lands cannot be allocated. An arrangement was then made between the parties. The first and the third respondents plaintiffs who were still interested in these lands had to re-pay the second respondent plaintiff of its portion of money and they requested the appellant defendant to continue with his endeavours to secure the said lands on their behalf. The appellant defendant undertook to refund the moneys to the first respondent plaintiff upon formal notification by the first and the third respondents plaintiffs (hereinafter referred to as "the second undertaking").

[6] Interestingly, the second undertaking was superceded by an oral agreement between the appellant defendant and the chairman of the first respondent plaintiff by the name of Lim Kim Yeow (hereinafter referred to as "the superceding agreement").

[7] The superceding agreement brought into the picture the following state of affairs: A

(a) that the first respondent plaintiff would provide a loan of RM20 million to a company known as Win Luck Sdn Bhd (hereinafter referred to as the "loan sum"); B

(b) that the first and third respondents plaintiffs' claim of the moneys would be released to Win Luck Sdn Bhd as being part of the loan sum; and

(c) that by way of a circular resolution dated 22 December 1999, it was agreed that Win Luck Sdn Bhd would pledge 35,714 ordinary shares in Borneo Utama Sdn Bhd as collateral and/or security for the loan sum. C

[8] By virtue of the superceding agreement, the stand of the appellant defendant was made clearer. It was this. That the second undertaking had been extinguished. D

[9] At the trial, evidence was led and it was not denied that the appellant defendant succeeded in procuring for the first and the third respondents plaintiffs an interest in shares that was equivalent to the moneys in two companies, namely, Anika Desiran Sdn Bhd and Corak Nakhoda Sdn Bhd (hereinafter referred to as "the two companies"). And by virtue of the superceding agreement, the first and the third respondents plaintiffs were then obliged to make payment for the shares allocated. E F

[10] The respondents plaintiffs disagreed and they maintained that the appellant defendant was obliged to cause the shares to be allocated to them by way of the two companies and, at the same time, to make payment for the same *in lieu* of the second undertaking. G

[11] On 19 September 2005, the High Court after a trial entered judgment in favour of the respondents plaintiffs.

[12] On 9 December 2005, the appellant defendant applied for a stay before this court and one of the grounds relied upon by the appellant defendant was that the first and the third respondents plaintiffs having been allocated shares in the two companies would not suffer a detriment should the stay be granted. H I

[13] The appellant defendant said that the first and the third respondents plaintiffs have received the full benefit and value of the moneys through the allocation of the shares.

[14] The affidavit in reply of Lim Chin Khuan on 28 December 2005 for the respondents plaintiffs attempted to adduce evidence that the first and the third respondents plaintiffs have already made payment to the two companies for the shares allocated and, consequently, they would suffer a detriment should a stay of execution be granted. This was the fresh evidence that the appellant defendant wanted to adduce.

[15] Bluntly put, the affidavit in reply of Lim Chin Khuan on 28 December 2005 contradicted the exhibit marked as "DSSN3". The fresh evidence showed that the first and the third respondents plaintiffs had made direct payment of the shares allocated to them to the two companies on the same day when the demand was made to the appellant defendant for payment of the shares.

[16] The jurisdiction to admit fresh evidence begins with the case of *Ladd v. Marshall* [1954] 3 All ER 745, a decision of the English Court of Appeal with a coram of Denning, Hodson and Parker LJJ. All the three Lord Justices wrote separate judgments. Of importance would be the judgment of Denning LJ. There Denning LJ laid down the principles for the reception of fresh evidence at p. 748 in this way:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[17] And according to three Malaysian Court of Appeal cases, the conditions stipulated in *Ladd v. Marshall* are to be read cumulatively and not disjunctively. See *Ing Merchant Bank (Singapore) Ltd & Anor v. Dato' Mohamed Anuar bin Embong* [2001] 4 CLJ 73 CA; *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and Other Appeals* [2004] 4 CLJ 282 CA; and *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238 CA.

[18] And if the appellant defendant fails to satisfy one condition, he fails altogether. A

[19] It must be emphasised that the discretion to admit fresh evidence is entirely that of the court to whom the application is made (*Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors* [1997] 2 CLJ 116 CA). B

[20] Statute wise, there are three statutes to refer to. Firstly, it is O. 55 r. 5A of the Rules of the High Court 1980 ("RHC") which states as follows: C

5A Restriction on fresh evidence (O. 55 r. 5A)

At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:

(a) at the hearing before the subordinate court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and D

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court. E

[21] Secondly, it is s. 69 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972) which enacts that:

69 Hearing of appeals F

(1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. G

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. H

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal. I

A (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

B (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

C **[22]** Thirdly, it is r. 7 of the Rules of the Court of Appeal 1994 which states as follows:

7 Power of Court to amend, admit further evidence, or draw inference of fact

D (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.

E (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

F (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent aforesaid, shall be admitted on special grounds only, and not without leave of the Court.

G (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:

(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

H (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

I (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appeal from or complained of the decision.

[23] In an unreported dissenting judgment in the Court of Appeal *vide* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng & Anor v. Thannimalai Subramaniam* [2009] 1 LNS 308 I had occasion to consider the phrase "special grounds" employed in r. 7(3) of the Rules of the Court of Appeal 1994 and this was what I said:

[49] The phrase "special grounds" appears in rule 7(3) of the Rules of the Court of Appeal 1994. The old English R.S.C. Order 59, rule 10(2), also makes reference to the phrase "special grounds" and the relevant part provides as follows: "no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds". Hale LJ writing for the English Court of Appeal in *Hertfordshire Investments Ltd. v. Bubb And Another* [2000] 1 WLR 2318 had this to say at page 2324 in regard to the phrase "special grounds". This was what his Lordship Hale LJ said:

> Special grounds, as we all know, meant that the fresh evidence satisfied the principles in *Ladd v. Marshall* [1954] 1 WLR 1489: that is, that it could not have been obtained with reasonable diligence for use at trial; if given it would probably have had an important influence on the result of the case; and it is apparently credible although not incontrovertible; although there are exceptional cases in which those principles do not apply, for example those involving the welfare of children.
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> There are, of course, strong reasons for this approach, which has a long pedigree. It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.

[24] Be that as it may, the three conditions in *Ladd v. Marshall* have been referred to from time to time in varying fact situations. But, judges must not let *Ladd v. Marshall* and the subsequent authorities to go astray from the fact that the question whether fresh evidence should be received is a matter purely for the

A discretion to be exercised judicially by the judges themselves. It must be remembered that it is not in the interest of justice to re-open a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result of the appeal (this is the second condition stated in *Ladd v. Marshall*).

B

[25] Perhaps the time has come for the court to admit fresh evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so (*Sinanide v. La Maison Cosmeo* [1927-1928] 44 TLR 574).

C

[26] I will now consider the three conditions set out in *Ladd v. Marshall* to the facts of the present case in the context of encl. 31a.

The First Condition (That The Evidence Could Not Have
D **Been Obtained With Reasonable Diligence For Use At The Trial)**

[27] The documents exhibited in the affidavit in reply of Lim Chin Khuan which was affirmed on 28 December 2005 which
E constituted the fresh evidence was suppressed during the trial before the High Court and it was in direct contradiction with "DSSN3". The fresh evidence showed that the first and the third respondents plaintiffs had made direct payment of the shares allocated to them, to the two companies, on the same day the
F demand was made to the appellant defendant for payment of the shares allocated *in lieu* of the second undertaking.

[28] It was the appellant defendant's defence that the second undertaking was extinguished by the superceding agreement and
G that the first and the third respondents plaintiffs were liable to pay for the shares allocated in the two companies.

[29] It must be recalled that both the first and the third respondents plaintiffs relied on the fresh evidence in order to oppose the appellant defendant's stay application.

H

[30] It cannot be doubted that the first and the third respondents plaintiffs had deliberately misled and suppressed material evidence before the High Court and alleged that the appellant defendant was liable for the payment of the shares, when
I in reality, from the fresh evidence it was clear that payment had been made by them from the very beginning. Consequently, the

appellant defendant's assertion that the first and the third respondents plaintiffs had agreed to pay for the shares allocation themselves had been credible and consistent with the appellant defendant's defence that was filed.

[31] The appellant defendant rightly submitted that the fresh evidence could not have been obtained with reasonable diligence for use at the trial before the High Court. It was apparent from exh. "DSSN3", that the appellant defendant, at all material times, believed that the first and the third respondents plaintiffs had not paid for the shares and had brought this suit to recover the moneys with the view of paying for the same.

The Second Condition (That The Evidence Must Be Such That, If Given, It Would Probably Have An Important Influence On The Result Of The Case, Although It Need Not Be Decisive)

[32] The fresh evidence would show that the first and the third respondents plaintiffs had already paid for the shares allocated to the two companies themselves. Had the learned judge of the High Court been advised that the first and the third respondents plaintiffs had made the payment for the shares allocated to the two companies on the very same day when the demand was made to the appellant defendant to make payment for the same, the learned judge of the High Court may come to an entirely different conclusion.

[33] Looking objectively at the material and the relevant facts that had been suppressed as well as the appellant defendant's defence, it clearly showed that the first and the third respondents plaintiffs had released the appellant defendant from the second undertaking.

[34] For these reasons, it can be surmised that the fresh evidence would probably have an important influence on the outcome of the claim.

The Third Condition (That The Evidence Must Be Such As Is Presumably To Believed, Or In Other Words, It Must Be Apparently Credible, Although It Need Not Be Incontrovertible)

[35] Enclosure 31a sought to admit as fresh evidence the notice of motion for stay dated 9 December 2005 together with the three affidavits. All these documents have been filed in court and

must be taken to be official court documents. *Prima facie*, these documents must be presumed to be believed and hence they must be apparently credible although it need not be incontrovertible.

[36] All the three conditions in *Ladd v. Marshall* have been satisfied. I would accordingly, without hesitation, allow encl. 31a.

[37] Once again, permit me to refer to my unreported dissenting judgment in the Court of Appeal *vide* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng & Anor v. Thannimalai Subramaniam*. There, this was what I said:

> [52] *Ladd v. Marshall* was decided in 1954. On 2.3.1970, the then Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 applied *Ladd v. Marshall*. In 1970, the Court of Appeal has not been set up. It was only in 1994 that the Court of Appeal was constituted. So, when the then Federal Court in *Lau Foo Sun v. Government of Malaysia (supra)* decided the issue of adducing further evidence, rule 7(3A) of the Rules of the Court of Appeal 1994 cannot be invoked for the simple reason that the Rules only came into force on 24.6.1994. We now have rule 7(3A) of the Rules of the Court of Appeal 1994 and we should vigorously apply it to the present appeal at hand instead of resorting wholesale to *Ladd v. Marshall*. A classic example would be the case of *Lombard Natwest Factors Ltd. v. Sebastian Justin Arbis* [2000] BPIR 79 (Ch D) where the brief facts may be stated as follows. Natwest sought to re-open a bankruptcy hearing because new evidence had come to light. The question was whether the provisions of Rule 59.10 in Schedule 1 to the Civil Procedure Rules 1998 ("CPR") should be interpreted in the light of the overriding objective in Rule 1.2 of the CPR or in the light of the Court of Appeal decision of *Ladd v. Marshall*. The form of wording in Rule 59.10 in Schedule 1 to the CPR is exactly the same as that adjudicated upon in *Ladd v. Marshall*. Hart J, held that even though the two provisions were worded indentically, it did not mean that the old interpretation had to apply. According to his Lordship, Rule 59.10 in Schedule 1 to the CPR had to be interpreted in the light of the overriding objective.
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> [53] It is now opportune to narrate the facts in *Ladd v. Marshall*. It is as follows. Ladd claimed repayment of a sum of £1,000 from Marshall. The latter denied receiving the money. At the trial, Ladd called Marshall's wife. In her evidence, she professed to know nothing of the transaction. The trial judge found that Ladd had not proved his case and gave judgment for Marshall. Some months after judgment had been entered, Marshall's wife obtained

a divorce from her husband and thereupon she told Ladd's solicitors that she had given false evidence at the trial. Her excuse was that at the time of the trial she was living in Marshall's house and was afraid of telling the truth. Ladd appealed to the Court of Appeal, applying for a new trial, and moved for leave to adduce further evidence. Ladd's counsel argued that the relevant rule of court (then it was RSC Order 58, rule 4) was in wide terms, that there was a complete discretion in the court which ought not to be fettered to receive further evidence "if the justice of the case requires it". Unfortunately, the appeal failed. Denning LJ said that it was very rare that an application was made to the court for a new trial on the ground that a witness had told a lie. His Lordship added that the principles to be applied are the same as those always applied when fresh evidence was sought to be introduced. His Lordship then set out the three conditions as reproduced in the early part of this judgment.

[54] Of course, you cannot allow *Ladd v. Marshall* to stand in the way of doing justice in an individual case. I have said this earlier. When you see this happening, you will notice that the decided cases have been distinguished by the judges and when this happens you will see that the law has become more elaborate. This causes no difficulty because it illustrates the exercise of discretion by the judges to the particular facts of the case.

[38] Now, even if I were to apply the provisions of r. 7(3A) of the Rules of the Court of Appeal 1994, I would still allow encl. 31a in favour of the appellant defendant. And additionally, it is also just to do so.

Wan Adnan Muhamad HMR:

[39] Ini adalah keputusan mahkamah. Panel ini sebulat suara telah membenarkan permohonan perayu melalui Lampiran 31a iaitu suatu notis usul yang dibuat di bawah peruntukan s. 69 Akta Mahkamah Kehakiman 1964 (Akta) berserta dengan peruntukan k. 7, Kaedah-Kaedah Mahkamah Rayuan 1994 (KMR). Lampiran 31a tersebut ialah untuk suatu perintah seperti berikut:

1. Dokumen-dokumen yang berikut, yang kesemuanya difailkan di Mahkamah Rayuan Malaysia iaitu Rayuan Sivil No.W-02-1151-2005 diterima dan dibaca sebagai keterangan pada pendengaran rayuan perayu di Mahkamah Yang Mulia ini:

   a) Notis usul bertarikh 9 Disember 2005;

A b) Affidavit Sokongan No.1 yang diikrarkan oleh Datuk Seri Panglima Mohd Sari bin Datuk Nuar pada 7 Disember 2005;

c) Affidavit jawapan responden-responden yang diikrarkan oleh
B En. Lim Chin Khuan pada 28 Disember 2005; dan

d) Affidavit Jawapan No.2 yang diikrarkan oleh Datuk Seri Panglima Mohd Sari bin Datuk Nuar pada 9 Januari 2006.

2. Kos permohonan ini dijadikan kos dalam kausa di- Mahkamah
C Rayuan Malaysia, Rayuan Sivil No.W-02-1151-2005; dan

3. Mana-mana perintah dan/atau arahan lain yang dianggap patut dan sah oleh mahkamah mulia ini.

D **[40]** Terlebih dahulu kami akan paparkan secara ringkas kronologi fakta kes untuk mendapat gambaran yang jelas bagi menghayati keputusan yang kami telah capai.

[41] Perayu pemohon ialah defendan dalam prosiding di Mahkamah Tinggi Kuala Lumpur. Manakala responden-responden
E ialah plaintif dalam prosiding berkenaan. Untuk mengelak kekeliruan, selepas ini saya bahasakan pemohon sebagai perayu dan responden-responden sebagai responden.

[42] Responden telah berjaya mendapat suatu penghakiman
F terhadap perayu selepas perbicaraan penuh di Mahkamah Tinggi. Tindakan responden ialah untuk mendapat balik sejumlah wang iaitu RM7,350,000 yang telah diberi kepada perayu berikutan suatu cadangan pembelian saham syarikat Pandai Kaya Sdn. Bhd. dan saham enam syarikat lain seperti dipersetujui oleh perayu dan
G responden.

[43] Perayu memperakui peranannya sebagai pemegang amanah (stake holder) wang berkenaan kepada responden 1 (R1) dan responden 3 (R3) yang merupakan agen kepada responden 2 (R2).
H Jika responden menarik balik rancangan pembelian saham syarikat-syarikat tersebut, perayu akan memulangkan balik wang RM7.350 juta tersebut seperti surat akujanji perayu bertarikh 10 November 1997 (eks. DSSN2).

I

[44] Responden telah menarik balik cadangan untuk membeli saham-saham berkenaan melalui surat mereka bertarikh 11 November 1997. Responden melalui surat peguam mereka bertarikh 5 December 1997 membuat tuntutan untuk mendapat balik wang RM7.350 juta tetapi perayu gagal berbuat demikian.

[45] Pembelaan perayu ialah akujanji tersebut (DSSN2) untuk bayar balik wang berkenaan telah diambil alih oleh perjanjian berbentuk sebahagian lisan dan sebahagian bertulis (Superceeding Agreement) diantara perayu dengan seorang bernama Lim Kim Yeo iaitu Pengerusi R1 yang berbentuk seperti berikut:

1. R1 akan biayai pinjaman kepada Syarikat Win Luck Sdn. Bhd. (Win Luck) sebanyak RM20 juta

2. Wang sebanyak RM7.350 juta akan dibayar kepada Win Luck sebagai sebahagian pinjaman RM20 juta tersebut.

3. Win Luck akan cagar sebanyak 35,714 saham biasa dalam Syarikat Borneo Utama Sdn. Bhd. sebagai 'collateral' dan jaminan kepada RM20 juta tersebut bagi maksud pelaburan R1.

4. R1 akan memasukan perjanjian baru mengenai pembelian saham Win Luck dalam Syarikat Borneo Utama Sdn. Bhd. dan pinjaman RM20 juta beroperasi sebagai penolakan (set off) terhadap harga pembelian saham Win Luck.

[46] Selepas penghakiman Mahkamah Tinggi diberi, perayu memohon penggantungan pelaksanaan penghakiman tetapi ditolak oleh Mahkamah Tinggi.

[47] Perayu membuat permohonan untuk penggantungan di-Mahkamah Rayuan dan hasil persetujuan kedua-dua pihak Mahkamah Rayuan memberi perintah penggantungan atas syarat perbicaraan dipercepatkan.

[48] Pada 9 Disember 2005 Perayu telah memohon untuk suatu pengantungan di mahkamah ini atas alasan bahawa R1 dan R3 telah pun mendapat penguntukan (allocation) saham-saham Win Luck dalam syarikat Borneo Utama Sdn. Bhd. tetapi masih belum membuat bayaran. Selanjutnya perayu menyatakan R1 dan R3 yang mendapat manafaat daripada saham-saham tersebut oleh itu ia tidak akan memudaratkan mereka jika pengantungan diberi.

[49] R1 dan R3 telah membantah permohonan pengantungan melalui affidavit jawapan yang diikrarkan oleh Encik Lim Chin Khuan (LCK) yang mengatakan bayaran telah dibuat terhadap saham-saham berkenaan oleh itu R1 dan R3 akan dimudaratkan jika pengantungan diberi oleh mahkamah ini.

[50] Perayu menyatakan affidavit LCK yang mengandungi dokumen-dokumen merupakan keterangan baru (fresh evidence) yang bercanggah dengan dua surat eks. D5 dan D24 yang dikemukakan dalam perbicaraan penuh di Mahkamah Tinggi. Selanjutnya perayu menyatakan keterangan baru menunjukan R1 dan R3 telah membuat pembayaran atas penguntukan saham-saham berkenaan pada hari notis tuntutan dibuat terhadap perayu. Atas alasan tersebut perayu mempertikaikan tanggungan beliau untuk membuat bayaran bersabit akujanji kedua (DSSN2).

[51] Perayu menegaskan bahawa akujanji kedua telah lupus dengan melalui suatu perjanjian yang mana R1 dan R3 telah membayar Anika Desiran Sdn. Bhd. (Anika) dan Corak Nakhoda Sdn. Bhd. (Corak). Oleh yang demikian perayu mendakwa beliau tidak perlu membayar R1 dan R3 seperti diputuskan oleh Mahkamah Tinggi.

[52] Dalam hujahnya peguam perayu menegaskan bahawa dokumen-dokumen yang diekshibitkan dalam affidavit LCK yang di ikrarkan pada 28 Disember 2005 adalah suatu keterangan baru (fresh evidence) yang disembunyikan semasa perbicaraan tindakan perayu terhadap responden di Mahkamah Tinggi dan secara langsung bertentangan dengan surat tuntutan oleh responden untuk mendapat balik wang RM7.350 juta daripada perayu (sila lihat DSSN3).

[53] Sehubungan dengan itu beliau menyarankan bahawa teras pembelaan perayu ialah akujanji kedua telah dilenyapkan oleh "Superceeding Agreement" dan menjadi tanggungan R1 dan R3 untuk membayar terhadap saham yang diperuntukan dalam kedua-dua syarikat berkenaan. Justeru itu menunjukkan R1 dan R3 bergantung kepada keterangan baru (fresh evidence) bila membantah permohonan perayu untuk pengantungan pelaksanaan.

[54] Adalah menjadi teras hujah peguam perayu jika 'fresh evidence' tersebut tidak disembunyi semasa perbicaraan sudah tentu Mahkamah Tinggi akan membuat penentuan yang berlainan (different conclusion) kerana keterangan baru tersebut begitu

menyakinkan untuk menunjukkan responden tidak ada asas untuk membuat tuntutan terhadap perayu atas wang sejumlah RM7.350 juta tersebut.

[55] Dalam hujah bertulis dan lisan untuk menentang permohonan di L31(a) peguam responden menegaskan bahawa pihak responden tidak pernah sembunyikan keterangan yang dimaksudkan. Persoalan pembayaran kepada Anika dan Corak tidak relevan kepada pembelaan perayu kerana pembelaan perayu berteraskan akujanji telah dilupuskan dengan kononnya wujud pembayaran atas jumlah RM7.350 juta tersebut kepada Win Luck.

[56] Mengikut beliau keterangan baru dapat dikemukakan di-Mahkamah Tinggi semasa perbicaraan jika langkah 'reasonable diligence' diambil oleh perayu misalnya melalui soal balas terhadap saksi-saksi. Kegagalan pihak perayu berbuat demikian membuktikan tiada langkah sepatutnya diambil oleh perayu malahan dalam affidavit sokongan perayu tidak menunjukkan langkah tersebut telah diambil. Adalah menjadi teras hujah pihak responden, pemohonan di L31a adalah 'after thought' untuk memperbaiki atau mengubah asas pembelaan perayu menjuruskan kepada 'relitigation' (*Maxisegar Sdn. Bhd. v. Silver Concept Sdn. Bhd.* [2005] 3 CLJ 238).

[57] Seperkara dengan itu peguam responden menghujahkan pembelaan perayu tidak diasaskan atas penguntukan saham-saham dalam syarikat-syarikat Anika dan Corak bersangkut paut dengan kononnya 'Oral Superceeding Agreement' yang boleh melupuskan tanggungan perayu untuk membayar balik wang RM7.350 juta tersebut kerana ia tidak diplidkan seperti terbukti dalam butiran pembelaan. Malahan ia juga tidak di plidkan mengenai peranan Perayu dalam penguntukan saham Anika dan Corak. Perayu juga tidak kemukakan keterangan semasa bicara mengenai saham Anika dan Corak ada kaitan dengan 'Oral Superceeding Agreement'.

[58] Prinsip undang-undang dalam permohonan di bawah peruntukan s. 69 Akta dan k. 7 KMR sudah mantap. Nas-nas seperti kes Inggeris *Ladd v. Marshall* [1954] 3 All ER 745 menjadi panduan bila mana mahkamah berdepan dengan permohonan sedemikian. Diantaranya ialah kes *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70; *Asiatic Development Berhad & Anor v. Balachandar Palanysamy* [1996] 1 CLJ 725.

[59] Prinsip-prinsip mengenai penerimaan keterangan lanjut (fresh evidence) telah diterapkan ke dalam KMR melalui PU(A) 380/98 dan menjadi kaedah kecil (3A) pada peruntukan k. 7 (*Maxisegar Sdn. Bhd. (supra)*. Kaedah 7(3A) adalah seperti berikut:

(3A) Pada masa pendengaran rayuan, keterangan lanjut tidaklah boleh diterima melainkan jika mahkamah berpuas hati bahawa:

(a) pada masa pendengaran di hadapan Mahkamah Tinggi atau Mahkamah Rendah, mengikut mana-mana yang berkenaan, keterangan baru itu tidak boleh didapati oleh pihak yang hendak menggunakan keterangan baru itu, atau bahawa usaha yang munasabah tidak mungkin menjadikan keterangan baru itu boleh didapati sedemikian; dan

(b) keterangan baru itu, jika benar, akan mempunyai atau mungkin mempunyai kesan penentu atas keputusan Mahkamah Tinggi atau Mahkamah Rendah itu, mengikut mana-mana yang berkenaan.

[60] Kami membenarkan L31a atas fakta latarbelakang kes ini. Jika diteliti fakta kes ini adalah berbeza dengan fakta kes-kes yang dibangkitkan oleh responden. Dalam kes-kes tersebut pemohonan adalah untuk kemukakan keterangan baru dalam rayuan ialah mengenai keterangan yang bukan merupakan yang wujud dalam prosiding rayuan. Misalnya dalam kes *Maxisegar* keterangan baru yang hendak dikemukakan ialah keterangan saksi yang akan diperolehi melalui proses prosedur pengambilan keterangan saksi dalam bicara. Dalam permohonan L31a keterangan baru ialah untuk mengemukakan affidavit-affidavit bersabit dengan prosiding penggantungan di mahkamah ini. Adalah tidak dinafikan keterangan tersebut tidak dikemukakan semasa perbicaraan di Mahkamah Tinggi. Ia hanya ditemui di dalam affidavit-affidavit dalam prosiding penggantungan yang dikatakan.

[61] Pada pendapat kami keterangan baru tersebut berkemungkinan dapat mempengaruhi keputusan HMT kerana ia adalah bersangkut rapat dengan pembayaran harga saham-saham dalam Anika dan Corak yang dianggap boleh melupuskan tanggungjawab perayu untuk membayar RM7.350 juta memandangkan dalam pembelaan perayu diplid wujud Superceeding Agreement. Adalah suatu prinsip mantap bahawa keterangan baru tersebut boleh diterima walaupun berkemungkinan boleh dipertikaikan.

[62] Kami bersetuju dengan hujah peguam pemohon bahawa keterangan baru yang dijumpai pada saat-saat akhir tidak mungkin dapat dijadikan kenyataan dalam pliding.

[63] Akhir sekali kami berpendapat dengan keterangan baru ia akan dapat membantu mahkamah ini mencapai keputusan yang saksama. Kami juga berpandangan penerimaan keterangan baru yang merupakan affidavit-affidavit berkenaan tidak akan memperjudiskan responden kerana affidavit-affidavit tersebut juga termasuk affidavit pihak responden sendiri.